Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JEFFREY CRANE,

Petitioner,

v.

OLSTEN STAFFING SERVICES and
LIBERTY MUTUAL,

Respondents.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Section 440.02(1), Florida Statutes (1994), which denies terms, conditions and privileges of employment to psychiatrically disabled persons, but allows and provides terms, conditions and privileges of employment to physically disabled persons, violates the Americans with Disabilities Act, Title I, 42 U.S.C. § 12101 *et seq.*?

Whether Section 440.02(1), Florida Statutes (1994), which precludes and denies individualized assessments of disability in the determination of eligibility for insurance benefits and instead predetermines eligibility based upon illogical and discriminatory standards, violates the Americans with Disabilities Act, 42 U.S.C. § 12102 *et seq.*?

Whether Section 440.02(1), Florida Statutes (1994), which utilizes a discriminatory standard for eligibility to terms, conditions and privileges of employment against psychiatrically disabled persons in favor of physically disabled persons, violates the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*?

Whether Section 440.02(1), Florida Statutes (1994), which denies and precludes psychiatrically disabled persons from participation in services, programs and activities of employment to which physically disabled persons are allowed, violates the Americans with Disabilities Act, Title II, 42 U.S.C. § 12132 *et seq.?*

Whether Section 440.02(1), Florida Statutes (1994) which allows terms, conditions and privileges of insurance benefits to physically disabled employees but denies terms, conditions and privileges of insurance benefits to psychiatrically disabled employees, violates the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*?

PARTIES TO THE PROCEEDING

The Petitioner, JEFFREY CRANE, is a resident of Ft. Myers, Lee County, Florida. Petitioner was the Appellant before the District Court of Appeal, First District, State of Florida; and the Claimant before the Judge of Compensation Claims, District M-South, State of Florida.

Respondent, OLSTEN STAFFING SERVICES, INC., is a Florida corporation licensed to do business in the State of Florida. The Respondent, LIBERTY MUTUAL INSURANCE COMPANY, is a Massachusetts corporation licensed to do business as an insurance company in the State of Florida. Respondents were the Appellees before the First District Court of Appeal, State of Florida; and the Employer and Carrier, respectively, before the Judge of Compensation Claims, District M-South, State of Florida.

There are no other parties to this action. However, since the constitutionality of Florida Statute Section 440.02(1) (1994) is drawn into question, 28 U.S.C. § 2403(b) may apply to this action and the Attorney General for the State of Florida has been duly served and notified of this proceeding.

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OPINIONS BELOW

The order that gives rise to this petition is the Per Curiam affirmation of the Florida First District Court of Appeal in *Crane v. Olsten Staffing Services,* Case No. 96-308 dated Jan. 16, 1997. This unpublished decision and the unpublished order of the Judge of Compensation Claims, District "M" South, State of Florida are reprinted hereto in the Appendix at pages App. 1-App. 6. In addition, the published opinion of the First District Court of Appeals, *Hensly v. Punta Gorda,* 22 Fla. L. Weekly D.159, Jan. 17, 1997, which is cited in *Crane* is reprinted here at pages App. 12-App. 21.

BASIS FOR JURISDICTION

The First District Florida Court of Appeal Per Curiam affirmed the decision of the Judge of Compensation Claims on January 16, 1997. Pursuant to *Jenkins v. State,* 385 So.2d 1356 (Florida 1980), this decision is not reviewable by the Florida Supreme Court. This court, therefore, has jurisdiction to review a decision of a state court of last resort pursuant to 28 United States Code, Section 1257.

STATUTORY PROVISIONS INVOLVED

Florida Statute § 440.02(1) (1994) provides in pertinent part that:

> "Accident" means only an unexpected or unusual event or result that happens suddenly. A mental or nervous injury due to stress, fright, or excitement only, or disability . . . is not an injury by accident arising out of the employment.

The Americans with Disabilities Act, Title I, 42 U.S.C. § 12112 provides, in pertinent part:

> (a) GENERAL RULE. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) CONSTRUCTION. – As used in subsection (a), the term "discriminate" includes –
>
> (1) limiting, segregating, or classifying a job applicant or employee in such a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
>
> (3) utilizing standards, criteria, or methods of administration –
>
> (A) that have the effect of discrimination on the basis of disability; or
>
> (B) that perpetuate the discrimination of others who are subject to common administrative control;

The Americans with Disabilities Act, Title II, 42 U.S.C., § 12131 provides in pertinent part that:

SEC. 201 DEFINITION

(a) PUBLIC ENTITY. – The term "public entity" means –

a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being affected.

(b) QUALIFIED INDIVIDUAL WITH A DISABILITY. – The term "qualified individual with a disability" means –

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provisions of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

The Americans with Disabilities Act, Title II, 42 U.S.C., § 12132 provides in pertinent part that:

SEC. 202 DISCRIMINATION

"Subject to the provision of this subchapter, no qualified individual with a disability, shall by reason of such disability, be barred from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

———————♦———————

STATEMENT OF THE CASE

The Petitioner, Jeffrey Crane, had an on-the-job accident which resulted in psychiatric disabilities. Petitioner applied for Florida workers' compensation benefits but was precluded and denied an individualized assessment and eligibility for these terms, conditions, and privileges of employment by Respondents. By law, workers injured on the job in the State of Florida are only entitled to workers' compensation benefits if they are physically disabled. However, if they are only psychiatrically disabled from the on-the-job accident, they are denied eligibility and individualized assessment.

This matter was heard before the Judge of Compensation of Claims, District M, State of Florida, and an Order denying benefits was entered by the Judge on January 12, 1996. A timely appeal was taken to the Florida First District Court of Appeal and was *Per Curiam Affirmed*.

REASONS FOR GRANTING THE WRIT

The Florida workers' compensation laws are in direct violation of the Americans with Disabilities Act in several areas. Its applicability to the psychiatrically disabled workers in the State of Florida flies directly in the face of the ADA's intent and purpose.

Prior to analyzing the law herein, it is necessary to understand petitioner's basic complaint against the Florida law. In the Florida workers' compensation world, if a robber walks into a convenience store and points his gun

at "A," touches his gun to "B," and pistol whips "C" and all three individuals become psychiatrically disabled within the meaning of the ADA as a result of the incident, only "C" is provided the terms, conditions and privileges of workers' compensation insurance coverage. "A" and "B" are denied an individualized assessment of their disability and precluded from access to the same eligibility as "C" for these terms, conditions and privileges of employment insurance.

The issue involved in this petition is for all intent and purposes a matter of first impression since state courts appear reluctant to disregard ancient precedent even when faced with contrary commands within recent federal law. See, *e.g., Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37 (D. Maine 1996); *Muller v. Automobile Club of So. Calif.*, 897 F. Supp. 1289 (S.D. Calif. 1995) and *Mobley v. Bd. Regents of Univ. System of Georgia*, 924 F. Supp. 1179 (S.D. Ga. 1996).

This petition presents the question of whether federal civil rights mandates as developed in the Americans With Disabilities Act (ADA) are applicable to state workers compensation programs when the issue is the more complex one of mental rather than physical incapacity, and the denial of benefits to psychiatrically disabled individuals denies Petitioner the individualized assessment mandated in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L.Ed.2d 307 (1987). The answer would appear to be simple enough, yet many states, including Florida, have refused to upgrade tests or standards to determine on-the-job mental injury.

Under 42 U.S.C. § 12102(2), a "disability" is: (1) "a physical or mental impairment that substantially limits one or more of the major life activities; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment." For example, a person is considered an individual with a disability under the ADA when a person's mental impairment substantially limits the major life activity of working. 29 C.F.R. § 1630.2(i) (1995) Mental impairments under ADA are dealt with in detail in the EEOC Compliance Manual, however there are examples of mental impairments that EEOC would recognize as coming within the ambit of ADA: manic depression, schizophrenia, organic brain syndrome, emotional or mental illness and depression. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. * 2 at 28, 51. The ADA regulations adopt section 504 of the Rehabilitation Act's definition of a physical or mental impairment:

> (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illnesses, and specific learning disabilities. 29 C.F.R. § 1630.2(h) (1995).

Admittedly, in such an amorphous area as depression and other types of mental impairment there is a question of whether such depression or stress is an actionable disability under ADA.

There is some question whether or not stress is considered a disability under the ADA. The EEOC has indicated that stress and depression are conditions that might or might not be impairments, depending whether these conditions result from a "documented physiological or mental disorder." [Title I, Equal Employment Opportunity Commission Technical Assistance Manual of Employment Provisions of the Americans with Disabilities Act (1992) at II-3.] A person suffering from general stress because of job or personal life pressures would not be considered to have an impairment. [*Id.*, at II-3.] However, and herein is the crux of petitioner's argument, if the person is diagnosed by a psychiatrist as having an identifiable stress disorder, he or she would have an impairment that might be considered a disability. Yet, in Florida, courts are not permitted to take this final factual step. Consider the conclusion of the judge of compensation claims in the present case:

> "I conclude that the claimant's psychiatric injury is causally related to the visual events [murder] that took place at the time. Since the Florida Workers' Compensation Law requires that there be a physical injury that causally produces a psychiatric injury before compensability can be found, I conclude that there was no physical injury from Mr. Crane's involvement in the physical events of the murder; therefore, there can be no basis upon which to attach a psychiatric condition. Certainly, if the claimant had suffered physical injuries in this altercation, his physical injuries would have been compensable. . . . The failure here of a physical injury prevents the compensability of his mental injury from being held compensable."

Accordingly, a plaintiff establishes a prima facie case under the employment discrimination subsection of the ADA when the plaintiff demonstrates "(1) that he [or she] is a disabled person within the meaning of the ADA; (2) that he [or she] is qualified, that is, with or without reasonable accommodation (which he [or she] must describe), he [or she] is able to perform the essential functions of the job; and (3) that the employer terminated him [or her] because of the disability." However, in Florida these steps are precluded.

Consider the present case wherein the Petitioner witnessed a gruesome murder at the workplace and became psychiatrically disabled from the event. Petitioner did not seek workers' compensation benefits for physical injuries nor did he claim any physical injuries. However, he did seek benefits for the psychiatric disability that he sustained. His employer and its carrier filed a Notice of Denial. The employer/carrier relied upon Fla. Stat. 440.02(1) 1994, which defines an "accident as a mental or nervous injury due to stress, fright or excitement only . . . is not an injury arising out of the employment." Since the claimant did not sustain a physical injury, the employer/carrier denied relief.

The Judge of Compensation Claims relied on Fla. Stat. 440.02(1) in denying coverage. It is noted that this statute has historically been held to necessitate a physical injury. See *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956). This position is correct under present Florida case law. See *Richard v. Greenshields Securities, Inc.*, 552 So.2d 1099 (Fla. 1989); and *Arnold v. State*, 610 So.2d 585 (Fla. 1st DCA 1992). Ultimately, the Judge declared that mental injuries could only be compensated if it was established

that the mental or emotional injury was a direct result of a physical injury. See also, *Nationwide v. McGee*, 597 So.2d 357 (Fla. 1st DCA 1992). Relying on the statute, the Supreme Court's interpretation of the statute, and claimant's testimony, it was held that there was no accident; hence, no compensation.

Claimant asserted that the Florida Workers' Compensation Act violated the ADA since it precluded an individualized assessment of the claimant's disability and instead relied upon a discriminatory method for determining eligibility to terms, conditions, and privileges of employment. As to claimant's ADA claim, the District Court of Appeal cited recent case law for the proposition that Florida Workers' Compensation law is not in conflict with the ADA. See *Barry v. Burdines*, 675 So.2d 587 (Fla. 1996) and *Barry v. Burdines*, 667 So.2d 241 (1st D.C.A. 1995) and *Hensley v. Punta Gorda*, 22 Fla. L. Weekly D. 159, Jan. 17, 1997. App. 12-App. 21.

The precedent relied upon in Florida, starts with *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956) which involved a mill worker who had suffered from varicose veins in both his legs. While at work, he was struck on his right ankle by a stack of wood. This accident aggravated his condition; he later developed thrombophlebitis and required hospitalization. The thrombophlebitis developed a blood clot, which was successfully treated. At his disability hearing, the claimant was found to be apathetic and depressed. He was also found to be fearful that his job, which involved standing for long periods of time, would aggravate his condition and cause another blood clot. The Deputy Commissioner and FWI Commission

found that the anxiety neurosis was a compensable injury under the Florida Workers' Compensation Act.

The Florida Supreme Court addressed the causal connection between the neurosis and the actual industrial injury. The Court noted that in workers' compensation cases the general standard was "the neurosis [is] the direct and immediate result of the industrial injury." *Id.*, at 795. It stated that "[t]he causal connection with the accident must be proven by clear evidence, for such a neurosis may arise from any number of causes . . . [t]he causal connection with an accident must not be remote." *Id.* (quoting *Thompson v. Railway Express Agency*, Mo. App. 1951, 236 S.W. 2d 36, 39.) In spite of language in ADA to the contrary, *Gabel* is still the position of the courts in workers' compensation claims.

Indeed, in *Gabel*, the Court found that the claimant's neurosis did not develop until well after the accident. Also, the medical evidence was unclear whether or not the thrombophlebitis was indeed a result of the accident. In fact, the ailment that the claimant feared, the blood clotting, could not possibly have resulted from an industrial injury. Thus, no causal connection was established. Certiorari was granted and the order of the Deputy Commissioner was quashed.

At inception, Florida's Workers' Compensation laws were aimed at relieving the hardships to workers created by on-the-job injuries. *McLean v. Mundy*, 81 So.2d 501 (Fla. 1955), *Florida Game & Fresh Water Fish Commission v. Drivers*, 65 So.2d 723 (Fla. 1953). The laws were a reasonable alternative not only to existing common law rights,

but also to statutory schemes in place when the constitution of 1968 was adopted. *Acton v. Fort Lauderdale Hospital,* 440 So.2d 1282 (Fla. 1983), and *Sasso v. Ram Property Management,* 431 So.2d 204 (Fla. 1st DCA 1983), *aff'd, Sasso v. Ram Property Management,* 452 So.2d 932 (Fla. 1984). Yet *Gabel* causes an entire class of disabled workers (mental) to be discriminated against where physical injury is not evident as a causal factor.

Enter the ADA. The ADA in strong terms provides that no employer:

> shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement or discharge of employees. . . . 42 U.S.C. § 12112.

Title I of ADA prohibits discrimination in employment on the basis of a disability. [Pub. L. 101-336, § 108 (July 26, 1990)]

Title II is the public entity provision of ADA. 42 U.S.C. §§ 12141-12165. Title II incorporates the "nondiscrimination principles" of the Rehabilitation Act; it extends the principles to state and local governments. *Helen L. v. DiDario,* 46 F.3d 325, 329 (3d Cir. 1995). Congress concluded that "public officials historically have been among the major perpetrators of segregated services in this country." Cited in *Hutchinson v. United Parcel Service, Inc.,* 883 F. Supp. 379 at 387 (N.D. Iowa 1995). One author analogizes the present state of public official discrimination against the disabled to the "Jim Crow laws"

of old. See Timothy M. Cook, *The Americans With Disabilities Act: The Move To Integration*, 64 Temp. L.Rev. 393, 400, 416 (1991) cited in *Hutchinson, supra.*

> [h]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination. . . . continue to be a serious and pervasive social problem. 42 U.S.C. § 12101(a)(2).

See *Hutchinson, supra* and *Helen L., supra* at 332.

With regard to the history of unequal treatment of persons with disabilities, Congress finds it to be 'real and compelling'. 42 U.S.C. 12101(a)(7). Furthermore, Congress defines individuals with disabilities as a discrete and insular minority who have been faced with restrictions and limitation, subjected to a history of purposeful unequal treatment, and relegated to a position of powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotyped assumptions not truly indicative of the individual ability of such individuals. 42 U.S.C. § 12101 (*Congressional Findings and Purposes*)

It would seem that most courts agree that the ADA protects individuals with disabilities from discrimination in almost every aspect of their lives. Most courts agree that the intent of the ADA is to prevent day-to-day discrimination against disabled persons by legislating a comprehensive approach on societal attitudes about disabled persons or physical barriers. Most courts agree that the ADA provides equal opportunity and equal treatment to individuals with disabilities, and in an effort to achieve the equality, the ADA imposes on entities subject to its

provisions not only an obligation not to discriminate because of a disability, but also an obligation to provide reasonable accommodation for the individual's disability, unless providing such accommodation would impose undue hardship. See, *e.g. Martin v. Voinovich* 840 F. Supp. 1175 (S.D. Ohio 1993), *Wood v. County of Alameda*, 875 F. Supp. 659 (N.D. Calif, 1995); *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386 (M.D. Fla. 1995). Where courts *depart* is at the point in a record in which the court must find discrimination. That is where *Gabel* enters the picture. *Gabel* mandates state discrimination where the illness in question (mental) cannot be linked to a physical injury. Herein lies the exact location for judicial guidance. *Hutchinson supra* at 393.

The ADA is unquestionably the most sweeping piece of civil rights legislation since the Civil Rights Act of 1964 because, for the first time, federal law protects individuals with disabilities against discrimination on the basis of their disability. This protection is comparable to that extended to minority groups since 1964. It is clear that *Americans with disabilities are now a protected class.* They represent 20% of the population of the United States [43 million]. Robert L Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 Harv. Civ. Rts. L.Rev. 413, 434 (1991). See also 42 U.S.C. § 12101(a)(7).

The Supreme Court of Florida has found preemption by the ADA yet ignores that finding when the claimant raises mental illness in the context of a claim. The ADA, as a civil rights act, is intended to maximize options available to workers, thus ensuring fairness. Florida

rejects those options where only mental disability is alleged.

Congress concluded that the ADA was intended to provide a national mandate for the diminution of discrimination against the disabled in all forms, to establish strong and consistent standards addressing such discrimination, and to ensure that federal agencies and courts implement Congress' intent with their broad regulatory, enforcement and interpretive powers. 42 U.S.C. § 12101(a). The ADA mandates remedies that prevent, in the future, discrimination against this discrete and insular minority. Clearly, the purposes of the ADA would be undermined by an interpretation which would in effect allow each state to supersede the ADA with its own interpretation of what illnesses are compensable. That is precisely what *Gable* has done.

If a class has experienced a "history of unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities (for example, gender-based discrimination), this court has concluded in no uncertain terms, that heightened – intermediate – scrutiny is the standard for review. See, e.g., *Mississippi University of Women v. Hogan*, 458 U.S. 718, 1025 S. Ct. 3331, 73 L.Ed.2d 1090 (1982) and *United States v. Virginia*, ___ U.S. ___, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996). Congress through the ADA, agreed. The ADA mandates heightened intermediate scrutiny standards, 42 U.S.C. § 12101(a)(7) (Supp. 1990); yet, in the present case no scrutiny is contemplated. How is a mentally impaired worker to seek redress if the state courts are closed to him? This Court is his only avenue. See Cf.,

Baker v. Carr, 369 U.S. 186 (1962); and *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

While the Florida Supreme Court hints at the fact that the goals of workers' compensation laws are subject to valid national civil rights legislation, the Court nevertheless has ignored this axiom and in so doing, has withdrawn the impact of the ADA's equal rights mandate upon the state workers' compensation. If the courts of Florida are permitted to act in clear disregard of the ADA's mandate, then their companions in other states will also be left free to determine what are or are not disabilities. As a result, workers' compensation benefits would then be for all intents and purposes outside of ADA's control, far removed from the intent of Congress.

Congress intended that under ADA, mental depression be recognized as a disability. *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 443 (E.D. La. 1994). The depression must actually exist or be perceived to "substantially limit . . . [a] major life activity." *Id.* In *Stradley*, an employer sought a motion to dismiss on the basis that an employee was not disabled under the ADA. *Id.* The court denied the request due to there being an issue of material fact. *Id.*, at 445. The court pronounced that the test for mental disability is "whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs." *Id.* at 443, (quoting *Partlow v. Runyon*, 826 F. Supp. 40, 45 (D.N.H. 1993). See also *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996).

The petitioner does not argue that all mental illnesses are automatically linked to the ADA. To be regarded as a

disability, the depression must be more than a temporary situation. "According to the EEOC Technical Assistance Manual for the ADA, temporary, nonchronic impairments that do not last for a long time and that have little or no long-term impact usually are not disabilities." *Muller v. Automatic Club of Southern California*, 897 F. Supp. 1289, 1294 (S.D. Calif. 1995). In *Muller*, as a result of being verbally assaulted on the job, the plaintiff claimed that she was disabled. *Id.* at 1291. The plaintiff relied on medical proof from two psychiatric exams. *Id.* at 1295. These exams were administered at the "height" of her mental anxiety. *Id.* Yet, the defendant offered medical evidence that plaintiff's condition did improve, was temporary and did not substantially limit any major life activity. *Id.* Although the plaintiff contended that she was permanently disabled, she offered no evidence to oppose the defendant's argument. *Id.* at 1297.

The *Muller* court offered an interesting evidentiary analogy. *Id.* The court compared plaintiff's mental illness to a broken leg. *Id.* A person with a broken leg could not rely upon his x-ray, taken one week after being placed in a cast, to prove his disability. *Id.* Likewise, a person with a mental illness cannot "pick" when she would like to be examined for a disability. One cannot rely on a certain period of time that simply because it conforms to one's evidentiary needs. The court is concerned with the "permanent" and "stationary" status of the illness, not individual fluctuations of the condition. *Id.*, at 1296.

A candidate for ADA protection must prove that her mental illness "affect[s] the individual's ability to find work across the spectrum of the same or similar jobs." *Id.* at 1297 (quoting *Partlow v. Runyan*, 826 F. Supp. 40, 44

(D.N.H. 1990). It is noted that "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* at 1295 (quoting 29 C.F.R. 71630.2(j)(3)(i)). In *Partlow*, the plaintiff offered no evidence that she was not fit for other jobs within her class. *Id.* at 1297. Simply wishing not to go back to a certain type of job is not adequate. *Id.* One must demonstrate that she lacked the "skills, training, or ability" to locate a similar job. *Id.*

Ultimately, a plaintiff must prove that his mental impairment also does more than just alter his lifestyle. *Soileau v. Guilford of Maine*, 928 F. Supp. 37, 47 (D. Me. 1996). A plaintiff must identify a "major life activity" that has been impaired. *Id.* In *Soileau* it was not sufficient that the plaintiff had increased difficulty in interpersonal interaction. *Id.* at 498. Simply not being able to get along with others is not a disability. *Id.* Unless the claimant can identify an impaired major life activity, he does not fall under the ADA umbrella. *Id.* However, Florida does not permit Petitioner to focus exclusively upon mental impairment. Petitioner has been denied the opportunity to an individualized assessment of his disability because his disability was not caused by physical trauma.

CAUSATION UNDER FLORIDA'S WORKER'S COMPENSATION LAW

Fla. Stat. 440.02(1) has been held to exclude a mental or nervous injury where the injury was not caused by a physical injury to the claimant. *City of Holmes Beach v. Grace*, 598 So.2d 71 (Fla. 1992). In *Grace*, the claimant, a

police officer, had been involved in an altercation with a suspect. *Id.* at 72. During the altercation, *Grace*, the claimant, was struck by the suspect. *Id.* The claimant had to leave his job due to his suffering from post-traumatic stress disorder. *Id.*

Even though claimant's illness could not be directly attributed to being struck, the District Court held in claimant's favor. *Id.* The Florida Supreme Court quashed this decision. *Id.* at 74. The court could not link *Grace's* illness to this physical injury. *Id.* The court said "that there must be an actual physical injury upon which to predicate compensation for a neurosis." *Id.* at 72. The court noticed, however, that the courts have never required that the injury be a serious one. *Id.* On the other hand, a "mere touching" is not sufficient either. *Id.* at 73. Ultimately, there must be: a) a physical injury that; b) is the "causative factor" of the neurosis. *Id.* Although a non-serious physical injury could theoretically cause a mental injury, it would be difficult to prove. *Id.* [*Grace, supra* overrules *Prahl Bros., Inc. v. Phillips*, 429 So.2d 386 (1st DCA 1983)]. *Prahl Bros.* held that the physical injury did not have to be a disabling one. The *Prahl* claimant argued for mental injuries as a result of having a gun put to her head during a robbery. Although *Grace* overrules *Prahl*, the *Prahl* claimant may have still found relief under the *Grace* reasoning. The *Prahl* claimant would have had to build a stronger causative link between the physical ordeal and emotional trauma. Instead of relying on the robbery as an on-the-job incident, the claimant would have had to rely on the severe touching that occurred.

Grace follows the "causal connection" test that has been utilized by the Florida courts. *Superior Mill Work v. Gabel,* 89 So.2d 794 (Fla. 1956).

STATE LAW IN VIOLATION OF THE ADA

The purpose of the ADA was to stop state-mandated discrimination. *Ellen S. v. Florida Board of Bar Examiners,* 859 F. Supp. 1489, 1494 (S.D. Fla. 1994). The ADA operates through the Fourteenth Amendment and Commerce Clause. *Id.* Congress also abrogated eleventh amendment sovereign immunity for ADA claims. *Id.* The ADA's goal is " 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' " *Id.* (quoting 42 U.S.C. § 12101(b)(1)). Therefore, state laws cannot conflict with the ADA.

In *T. P. v. DuBois,* residents of the Massachusetts Department of Health or State Hospital Facilities challenged a state statute. *T. P. v. DuBois,* 843 F. Supp. 775 (D. Mass. 1993). The statute required residents of mental health facilities to contribute toward the cost of counsel appointed to provide representation for them. *Id.* The court held that this statute was a violation of the residents' right to due process and equal protection under the Fourteenth Amendment, and to freedom from discrimination on the basis of disability, as guaranteed by Title II of the Americans with Disabilities Act." *Id.* The court ordered accordingly. *Id.* at 796.

In Texas, a community mental health center's board of trustees held its meetings at 7:00 a.m., *Dees v. Austin*

Travis County Mental Health and Mental Retardation, 860 F. Supp. 1186, 1187 (W.D. Texas 1994). *Dees*, an advocate for the mentally ill and a resident who suffered drowsiness as a result of mental health medication, claimed that this meeting time discriminated against her disability. *Id.* at 1187. At 7:00 a.m., *Dees* would be too drowsy to participate in these meetings. *Id.* The board offered to change the meeting time to 8:00 a.m. with additional accommodation for *Dees*. *Id.* at 1188. *Dees* did not believe that neither the time change or accommodations were sufficient. *Id.* at 1189.

The court noted that "the fundamental purpose of the ADA is to integrate the disabled into mainstream activities." *Id.* at 1191. The suggested modifications failed. *Id.* The Health Center suggested a "balancing test of competing interests," in which the interests of all parties should be weighed. *Id.* Instead, the court said the test should be "whether the modification can be made without fundamental alteration or undue burden such that disabled individuals will not be denied the equal opportunities enjoyed by others." *Id.* The Health Center did not prove by a preponderance of the evidence that altering the schedule of meetings would violate the "integrity of the program," and *Dees* prevailed. *Id.* at 1193. The Health Center could not prove that accommodations would result in a violation of the "integrity of the program"; or a "fundamental" change in the board or services provided; or an "administrative hardship or burden." *Id.*

Consider *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981), in which the plaintiff instituted an action based on the claim that he was denied admittance to a psychiatric residency program

because he suffered from multiple sclerōsis. An issue the court faced was what standard of review to apply when there is an alleged violation of the *Rehabilitation Act of 1973*. The court held that a higher standard than a "rational basis test" is mandated. *Id.*, at 1383. The defendant in *Pushkin* argued that their decision not to admit plaintiff to the residency program must be reviewed under equal protection standards and must, therefore, be affirmed under the rational basis test. *Id.* The court held that the rational basis test is not applicable where there is alleged violation of § 504 of the Rehabilitation Act. In its reasoning, the court stated that the standards for determining the merits of a case under § 504 are contained in the statute. *Id.* at 1384.

The court further reasoned that to ask the court to defer to a rational basis argument when analyzing a claim under § 504 is to ask the court to ignore the plain statutory language of § 504. *Id.* The court added that to apply a rational basis test would be to reduce the statute to "nothingness, which should be avoided." *Id.*

Pushkin was cited favorably in *Maine Human Rights Commission v. Canadian Pacific Ltd.*, 458 A.2d 1225 (Maine, 1983). In *Maine Human Rights Commission*, the plaintiff brought an action alleging that the defendant unlawfully discriminated against the individual plaintiffs because of their physical handicaps in violation of their rights under the *Maine Human Rights Act*. The court held that

> the 'rational relationship' test, as generally applied in minority constitutional equal protection analysis, requires only that some conceivable set of facts could rationally support the distinction above . . . [S]uch a highly deferential

> standard of review, is clearly inappropriate when reviewing the adequacy of an affirmative defense raised by an employer against whom a case of employment discrimination has already been established. 151 at 1231. (citing *Pushkin, supra*).

See also *Williams v. Colorado Springs School District*, 641 F.2d 835, 841 (10th Cir. 1981) (rational relationship inapplicable in gender discrimination cases under Title VII of the Civil Rights Act of 1964.)

Other Civil Rights cases have held that discrimination within a similar class presents courts with a valid cause of action, and heightened scrutiny is the standard for review. See *Walker v. Secretary of the Treasury*, 713 F. Supp. 403 (N.D. GA. 1989) and *Rodriguez v. Gattuso*, 795 F. Supp. 860 (N.D. Ill. 1992).

Not all courts agree with the rationale adopted in *Pushkin*. In *Cramer v. Florida*, 885 F. Supp. 1545 (M.D. Fla. 1995), the court held that the ADA did not apply to alleged discrimination between two disabled persons by favoring one over another. The court, applying a rationality test, found that the Florida Workers' Compensation Statute did not violate the ADA by use of "impairment" ratings even though persons with lesser impairment ratings, thus, lower benefits, might be more disabled than persons with higher impairment ratings.

In *Muller v. Hotsy Corporation*, 917 F. Supp. 1389 (N.D. Iowa 1996) and *Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379 (N.D. Iowa 1995), the courts found that in an ADA case, at the prima facie case phase, a plaintiff need only make a showing that gives rise to an inference of discrimination on the basis of disability. *Muller* at 1410;

Hutchinson at 395. The ADA defines the class of disabled persons rather than allowing employers or a state to control whom the ADA protects. *Id.*

The same arguments apply to the Florida Workers' Compensation Statute § 440.02(1), which under color of state law, permits discrimination among the members of the ostensibly protected class. Fla. Stat. 440.02(1) allows recovery for mental disabilities that are accompanied with physical injury, but denies recovery for mental disabilities that are not accompanied by physical injury. Florida courts have already created the scenario feared in *Muller* and *Hutchinson* – wherein the discrimination against one disabled person in favor of another disabled person is permitted. At the very least, there is a discrepancy between jurisdictions as to the interpretation of the ADA – whether it only applies to a disabled plaintiff versus a nondisabled person or whether, as in the Iowa cases, the ADA was intended to prohibit discrimination against the disabled regardless of whether it is in favor of a nondisabled person or a person with lesser disabilities.

In *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993), a class of persons with mental retardation or development disabilities and a subclass of medicaid recipients brought an action alleging violations of civil rights under the Constitution, the Rehabilitation Act, Americans with Disabilities Act, and Developmental Disabilities Act. The defendants in *Martin* alleged that § 504 of the Rehabilitation Act did not provide relief when the discrimination was between person with different handicaps, as opposed to between handicapped person and non-handicapped persons. *Id.* at 1190. The court held that, as a matter of statutory construction, nothing in the language of § 504

suggests that it can never apply between persons with different handicaps. In its reasoning the court stated,

> The language of § 504 evinces an intention to eliminate handicap-based discrimination and segregation. A strict rule that § 504 can never apply between persons with different disabilities would thwart that goal. Such a rule would in effect, allow discrimination on the basis of disability. The relevant inquiry is whether the application of § 504 between persons with different (varying degrees of disability furthers the goal of eliminating disability-based discrimination . . . The severity of plaintiffs' handicaps is itself a handicap which, under § 504, cannot be the sole reason for denying plaintiffs access to community programs.

In a more recent case the United States District Court for Connecticut held that the regulations promulgated under both § 504 of the Rehabilitation Act and the ADA clearly prohibit discrimination based upon severity of disability. *Messier v. Southuny Training School*, 916 F. Supp. 133 (D. Conn. 1996). In *Messier* residents of a state institution for persons with mental retardation sued the institution alleging discrimination in community placement based on the severity or nature of their disabilities. *Id.* at 136. The *Messier* court noted that numerous courts have recognized that both § 504 Rehabilitation Act and the ADA prohibit discrimination on the basis of severity of a person's disability. See *Plummer v. Branstad*, 731 F.2d 574, 578 (8th Cir. 1984); and *Lynch v. Maher*, 507 F. Supp. 1268 (D. Conn. 1981) (discrimination on the basis of extent of handicap is actionable under § 504).

In *Cramer*, supra, the Court cited this Court's opinion in *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L.Ed.2d 618 (1988), as supportive of its holding that nothing in the Rehabilitation Act requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped person. *Cramer, supra*, at 1152. The court in *Messier*, however, disagreed. *Messier* held that:

> The primary holding of *Traynor* was that the 1978 amendments to the Rehabilitation Act of 1973 should not be deemed to have repealed a 1977 statute which allowed for an extension of time to use veterans' benefits under certain circumstances, but only on the condition that a veteran's physical or mental disorder was not a result of willful misconduct by that veteran. The court did state in dicta that "the central purpose" of § 504 is to "assure that handicapped individuals", and that "there is nothing in [§ 504] that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." However, the circumstances underlying *Traynor* clearly show that the Court was not considering whether discrimination based upon extent of disability is generally actionable under § 504. Rather, the Court had no need to consider this question, because the regulations promulgated under § 504 provide that § 504 does not prohibit "exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons." This exception

> to § 504's coverage is clearly not applicable to the instant case.

Messier, supra, at 142, n. 7 (all internal citations omitted).

Non-ADA cases are also instructive. *Brown v. Beal,* 404 F. Supp. 770 (E.D. Pa. 1975), found that the disparate treatment of similarly situated "disabled" persons under Pennsylvania's medicaid program raised a substantial constitutional question of equal protection under the Fourteenth Amendment – whether that classification of disabled individuals rationally furthers a legitimate state interest. Also, in *Spragens v. Secretary of Health and Human Services,* 808 F. Supp. 1537 (D.Wyo. 1992), the court found that a statutory classification pursuant to which a quadriplegic suffering from erythropoiesis lost his disability benefits by having net earnings between $300 to $650 per month, while a person disabled by blindness who earned the same amount would continue to receive disability benefits, was arbitrary and discriminatory in violation of equal protection. The court stated that the disabled are a sensitive class, and when classifications involve sensitive but nonsuspect classes, the courts may engage in a more substantial analysis of rationality. *Id.* at 1540. A classification must be reasonable and not arbitrary. Florida's classification as applied to Petitioner is arbitrary. This is not what Congress intended!

CONCLUSION

In enacting the Americans with Disabilities Act, Congress intended civil rights for disabled persons. Congress, after many false starts, enacted civil rights legislation to

protect all forms of disability. In this legislation, Congress established a heightened level of scrutiny eschewing *Cleburne*'s rationality standard. Since 1990, courts in both the federal and state systems continue to disagree as to the local impact of ADA and an appropriate level of review. The entire scenario is in fact a replay of gender-based discrimination cases. See, e.g., *United States v. Virginia*, ___ U.S. ___, 116 S. Ct. 2264, 135 L.Ed.2d 1735 (1996). The same compelling reasons put forth by the United States in *United States v. Virginia, supra,* are at work in the present case.

For the reasons stated, it is respectfully submitted that the petition for a writ of Certiorari should be granted.

Respectfully submitted:

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APPENDIX

STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY DIVISION OF WORKERS' COMPENSATION OFFICE OF THE JUDGE OF COMPENSATION CLAIMS DISTRICT "M-SOUTH"

CLAIM NO: 152-50-2082 D/A: 8/25/94

EMPLOYEE: JEFFREY CRANE
1217 S.E. 21st Avenue
Cape Coral, Florida 33990-1935

Represented by: PETER C. BURKERT, ESQUIRE
Post Office Box 2485
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EMPLOYER: OLSTEN STAFFING SERVICES
3940 Metro Parkway, #107
Fort Myers, Florida 33916

CARRIER: LIBERTY MUTUAL INSURANCE COMPANY
Post Office Box 31204
Tampa, Florida 33631-3204

Represented by: ALBERT M. FRIERSON, ESQUIRE
HENDERSON, FRANKLIN, STARNES & HOLT
Post Office Box 280
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ORDER

This Cause came on to be heard before the undersigned Judge of Compensation Claims on July 13, 1995 in Fort Myers, Lee County, Florida. The claimant, Jeffrey Crane, was represented by his attorney, PETER C. BURKERT. The employer, OLSTEN STAFFING SERVICES, and the carrier, LIBERTY MUTUAL INSURANCE COMPANY, were represented by their attorney, ALBERT M. FRIERSON.

The claim is for:

1. Temporary total disability or temporary partial disability from the date of the accident to the present and continuing.

2. Payment of medical bills incurred by Dr. Berdick, Dr. Olivera, and Issacs.

3. Authorization for continued care and treatment by a psychiatrist and/or a psychologist.

4. Penalties, interest, costs, and attorney fees.

The employer and carrier defended the claim on the following grounds:

1. The claimant did not suffer an "accident" arising out of and in the course and scope of his employment as defined by Section 440.02(1), Florida Statutes (1994).

2. There is no medical evidence that the claimant suffered any physical injury in connection with or as a result of the incident of August 25, 1995.

3. The claimant's alleged psychiatric condition and need for psychiatric and psychological treatment are not the result of an accident arising out of and in the course and scope of the claimant's employment.

4. The claimant's alleged psychiatric condition and need for psychiatric and/or psychological treatment constitute a mental or nervous injury due solely to stress, fright, or excitement and, according to Section 440.02(1), are not compensable.

5. A physical injury was not the major contributing cause of the claimant's psychiatric condition.

6. The psychiatric condition is not the result of an injury.

7. The claimant has failed to satisfy the burden of proof provided in Section 440.09(1)-1994 requiring the claimant to show that a physical injury was the major contributing cause of the claimant's psychiatric disability.

The claimant responded to the defenses raised by the employer and carrier herein by raising the issue of the Americans With Disabilities Act and whether or not the provisions of the Americans With Disabilities Act prevent the undersigned from applying certain legal criteria under Florida Law to the analysis of this matter.

The following exhibits were received into evidence at the hearing:

1. The Notice of Final Hearing dated April 27, 1995.

2. A composite exhibit consisting of the Docketing Order, the claimant's attorney's transmittal memorandum and his Petition for Benefits.

3. A stipulated set of facts offered into evidence by both sides. In addition to the exhibits and documents set forth above, the parties have stipulated that the undersigned Judge of Compensation Claims has jurisdiction over the subject matter and parties in this workers' compensation proceeding, although the employer and carrier do not stipulate that the undersigned Judge of Compensation Claims has jurisdiction over any matters pertaining to the Americans With Disabilities Act or any other law either state or federal outside the confines of Chapter 440 of the Florida Statutes. The parties have also agreed that venue is proper in Lee County, Florida and that there was an employer/employee relationship between the claimant and the named employer on August 25, 1994. The parties have agreed that workers' compensation coverage was in effect on the date of the alleged incident and that the parties received timely notice not only of the incident, but also of the hearing.

Based upon the stipulations of the parties as set forth above, it is necessary for me to make a determination as to the compensability of this claim. I conclude that this particular type of injury is excluded from coverage under the Florida Workers' Compensation Law. Section 440.02(1) defines an accident in such a way as to exclude mental injuries due to stress, fright, or excitement only. I conclude that this is, in fact, a mental injury due only to stress, fright, or excitement. My conclusion is based upon the stipulated set of facts that the claimant sustained no physical injury as a result of the incident that occurred on August 25, 1994 and that his psychiatric condition is solely related to having witnessed or observed a murder of a co-employee.

I conclude that the claimant's psychatric injury is causally related to the visual events that took place at the time. Since the Florida Workers' Compensation Law requires that there be a physical injury that causally produces a psychiatric injury before compensability can be found, I conclude that there was no physical injury from Mr. Crane's involvement in the physical events of the murder and, therefore, there can be no basis upon which to attach a psychiatric condition. Certainly, if the claimant had suffered physical injuries in this altercation, his physical injuries would have been compensable under the Workers' Compensation Law and if he had suffered physical injuries that produced his psychiatric condition, then his psychiatric condition may have been compensable as well. The failure here of a physical injury prevents the compensability of his mental injury from being held compensable.

The claimant raises issues under the Americans With Disabilities Act and whether or not there is a discrimination occurring in this instance because the claimant's mental injuries are not treated the same as he would be treated had he suffered physical injuries resulting in the same need for medical treatment and loss of ability to work. The claimant's argument in effect is that Section 440.02(1) violates the Americans With Disabilities Act and that the Federal Act has authority over the State Act. I find that it is not within my power, authority, or jurisdiction to find that the Workers' Compensation Statute in question violates any of the State or Federal Statutes or constitutional rights or remedies guaranteed by the Florida or United States Constitutions. This matter can only be determined by a court of competent jurisdiction.

WHEREFORE, I find that the claim of JEFFREY CRANE, be, and the same is, hereby denied and dismissed.

DONE AND ORDERED in Fort Myers, Lee County, Florida.

(SEAL)

/s/ Dan Turnbull
Judge of Compensation Claims

I HEREBY CERTIFY that the foregoing Order was entered, and true copies served by mail or by hand delivery on this 2 day of January, 1995, on the parties and counsel at the addresses written below.

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/s/ Kathleen P. Hayes
Assistant to the Judge of
Compensation Claims

STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY DIVISION OF WORKERS' COMPENSATION OFFICE OF THE JUDGE OF COMPENSATION CLAIMS DISTRICT "M-SOUTH"

CLAIM NO: 152-50-2082 D/A: 8/25/94

EMPLOYEE: JEFFREY CRANE
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Represented by: ALBERT M. FRIERSON, ESQUIRE
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STIPULATED FACTS

COME NOW the parties, by and through their undersigned attorneys, and stipulate that the facts set forth

below are true and correct and that this document may be received as evidence in the above captioned cause.

1. On August 25, 1994, JEFFREY ALDEN CRANE was an employee of OLSTEN STAFFING SERVICES, a temporary employment service. On that date he was assigned to work at Haverty's Furniture Warehouse. While in the course and scope of his employment, Crane witnessed a Haverty's employee murder another Haverty's employee.

2. Crane was in the warehouse when he heard a popping noise behind him. He turned and observed Alonzo Everett with a carpenter's hammer in his hand. He then observed Alonzo Everett strike fellow employee Antonio Vaughn in the head with the hammer. Antonio Vaughn fell to the ground, apparently unconscious. Everett continued to strike Vaughn with the hammer. Crane yelled at Everett to stop and grabbed Everett in an attempt to pull him away from the victim. However, Everett pushed Crane away and threatened him with the hammer. Threafter, Everett continued to repeatedly strike Vaughn with the hammer. As a result of the attack, Vaughn died.

3. Crane received no physical injury as a result of the incident described above, although there was physical contact with the assailant, Everett. Subsequently, Crane was seen by Dr. Kenneth A. Berdick, who testified that Crane was suffering from acute anxiety and depression. It was the opinion of Dr. Berdick on deposition that Crane's anxiety and depression were causally related to having witnessed a murder. The anxiety and depression were not related to a physical injury. Crane's symptoms have

included sleep disturbance, repeated nightmares, obsessive protective behavior, weight loss, reduced appetite, blunted affect, fears about his own safety and the safety of his family, and reliving the events of the murder.

4. It is stipulated that Crane required psychiatric treatment as a result of his anxiety and depression. He also lost some time from work.

Dated this 20 day of ~~July~~ December, 1995.

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Employer/Carrier

JEFFREY CRANE,

Appellant,

v.

OLSTEN STAFFING SERVICES and LIBERTY MUTUAL INSURANCE COMPANY,

Appellees.

_____/

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 96-308

Opinion filed January 16, 1997.

An appeal from an order of the Judge of Compensation Claims. Dan Turnbull, Judge

Alex Lancaster and Amy L. Sergent of Lancaster & Eure, P.A., Sarasota, for Appellant.

Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for Appellants.

PER CURIAM.

AFFIRMED. *See Hensley v. Punta Gorda,* No. 96-358 (Fla. 1st DCA Jan. 6, 1997).

ERVIN, KAHN and DAVIS, JJ., CONCUR.

JUDY HENSLEY, Appellant, v. PUNTA GORDA and GALLAGHER BASSETT SERVICE, Appellees, 1st District. Case No. 96-358. Opinion filed January 6, 1997. An appeal from an order of the Judge of Compensation Claims Dan Turnbull, Judge. Counsel: Alex Lancaster and Amy L. Sergent of Lancaster & Eure, Sarasota, for Appellant. Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, P.A., Ft. Myers, for Appellees.

(KAHN, J.) Judy Hensley, appellant and claimant in this workers' compensation matter, asks us to rule that section 440.02(1) Florida Statutes (Supp. 1994), does not comport with the requirements of Title I of the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117.[1] We

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[1] In her issue on appeal, claimant Hensley also argues that section 440.09, Florida Statutes (Supp. 1994), violates Title I of the ADA. Nowhere in the brief, however, has Hensley identified which portion of section 440.09 runs afoul of the ADA. The only portion of section 440.09 that expressly treats mental or nervous injuries appears in section 440.09(1), and provides that mental or nervous injuries "occurring as a manifestation of an injury compensable under this section" must be demonstrated by clear and convincing evidence. It is undisputed in this appeal that Hensley's mental condition has not resulted from a compensable physical injury.

Also, at various places in her brief, Hensley has made reference to Title II of the ADA, 42 U.S.C. §§ 12131-12165. She has not, however, discretely articulated a Title II violation. Moreover, the point on appeal as set out in appellant's brief is limited to an alleged violation of Title I of the ADA. For these reasons, the inquiry in this appeal is limited to the question of whether section 440.02(1), Florida Statutes (Supp. 1994) violates the requirements of Title I of the ADA.

conclude, however, that Hensley has failed to demonstrate her entitlement to the protection of the ADA. Moreover, she has failed to demonstrate that section 440.02(1) is inconsistent with, and therefore preempted by, the ADA. Accordingly, we affirm the order of the Judge of Compensation Claims which denied compensability for Hensley's psychiatric injury.

For purposes of this appeal, the pertinent provision of section 440.02(1), Florida Statutes (Supp. 1994) provides:

> A mental or nervous injury due to stress, fright, or excitement . . . is not an injury by accident arising out of the employment.

Hensley contends that she was exposed to recurring sexual harassment and hostility in her work environment as an administrative secretary for the City of Punta Gorda Public Works Department. She brought a workers' compensation claim seeking temporary total or temporary partial disability benefits from September 1994 and continuing. Hensley and the City stipulated that Hensley developed a psychiatric injury as a result of her work environment. The parties further stipulated that Hensley did not sustain a physical injury resulting in her psychiatric condition. At the hearing below held on November 27, 1995, the only issue presented was whether claimant's psychiatric condition was compensable under the Florida Workers' Compensation Law. Relying upon section 440.02(1), Florida Statutes, and *City of Holmes Beach v. Grace*, 598 So. 2d 71 (Fla. 1992), the judge of compensation

claims ruled that Hensley's psychiatric condition is not compensable.[2]

As an administrative officer vested with only certain limited quasi-judicial powers, a judge of compensation claims does not have jurisdiction to declare a portion of the Florida Workers' Compensation Act unconstitutional or violative of a federal statute. *Sasso v. Ram Property Management*, 431 So. 2d 204, 207-208 (Fla. 1st DCA 1983), *approved* 452 So. 2d 932 (Fla. 1984). Accordingly, this court has jurisdiction to consider such claims in the first instance. *Id.* Nonetheless, in cases such as the present one, the record must clearly indicate the appellant's standing to raise the issue of the unconstitutionality or invalidity of a specific section of the law. *Id.* This rule is all the more valid in a case such as the one now before us where appellant is asserting her rights under the ADA, rather than making a facial constitutional challenge to a portion of the Florida Workers' Compensation Act. This is so because the ADA requires individualized determinations of entitlement. *See* 42 U.S.C.A. § 12102(2)(A); *Homeyer v. Stanley Tulchin Ass'n, Inc.*, 91 F.3d 959 (7th Cir. 1996).

I. "Qualified Individual with a Disability"

The operative portion of the ADA, 42 U.S.C., section 12112(a), provides:

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[2] In *Grace*, the supreme court construed section 440.02(1) to limit compensability of psychiatric injuries to those cases in which physical injury suffered by the claimant is a cause of the mental or nervous injury.

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[3]

The Florida Supreme Court has recently explained that this portion of the ADA is "sufficiently broad to encompass the entitlement to workers' compensation benefits." *Barry v. Burdines* 675 So. 2d 587, 589 (Fla. 1996).

One seeking relief under the employment provisions of the ADA (Title I) must demonstrate that she is a "qualified individual with a disability" and has been discriminated against because of the disability. *Cramer v. Florida,* 885 F.Supp. 1545 (M.D. Fla. 1995); *Cheatwood v. Roanoake Industries,* 891 F.Supp. 1528 (N.D. Ala. 1985); *Mears v. Gulfstream Aerospace Corp.* 905 F.Supp. 1075 (S.D. Ga. 1995), *aff'd,* 87 F.3d 1331 (11th Cir. 1996). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The term "essential functions" means the fundamental job duties of the employment position. 29 C.F.R. § 1630.2(n)(1). Consideration must be given to

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[3] We do not reach the question of whether the employer here is a "covered entity" for ADA purposes. 42 U.S.C. §12111(2),(5). We do note, however, that a right to relief under Title I would require a showing of illegal discrimination by a covered entity.

* * *

the employer's judgment of what functions of a job are essential. 42 U.S.C. § 12111(8); *Cheatwood*.

Significantly for the present case, the provisions concerning "qualified individual with a disability" contain no reference to an individual's future ability to perform the essential functions of a job position; rather, they are formulated entirely in the present tense. *Cheatwood*. If an ADA claimant cannot perform the essential functions of the job, such claimant is not entitled to the protection of the ADA. In *Mears*, the court held that where a plaintiff states that she cannot go back to a job site and her presence at the job site is "essential" to performing her job, she is not "qualified" to perform the essential functions of her job and may not bring an action for discrimination under the ADA. *See also, Dockery v. North Shore Medical Center*, 909 F.Supp. 1550 (S.D. Fla. 1995); *Smith v. Blue Cross Blue Shield of Kansas, Inc.*, 894 F.Supp. 1463 (D.Kan. 1995).

In the case before us, the record is not susceptible of an inference that Hensley is a qualified individual with a disability. At the hearing below she presented no testimony as to what functions of the job are essential, or whether or not she could perform the job. Moreover, we find her claim for protection under Title I of the ADA inconsistent with the fact that in this very proceeding she is seeking either temporary total or temporary partial disability benefits. Disability under the Florida Workers' Compensation Law presupposes that claimant is unable, by reason of her injury, to successfully perform all the functions of her previous job. §440.02(11), Fla. Stat. (Supp. 1994) ("Disability" means incapacity because of

injury to earn in the same or any other employment the wages employee earned at the time of injury).

Because Hensley has not established her status as a qualified individual with a disability, she may not seek relief under the employment provisions of the ADA. *See, Reiff v. Interim Personnel, Inc.*, 906 F.Supp. 1280, 1292 (D. Minn. 1995) (Claimant's representation that he is "totally disabled" and ADA's definition of "qualified individual with a disability" are "mutually exclusive.")

II. ADA Preemption

Even if the record allowed Hensley to maintain her challenge, or if we viewed this purely as a challenge to the facial validity of section 440.02(1), we would nonetheless affirm the order on appeal. Section 440.02(1) is not preempted by the requirements of Title I of the ADA because the Florida statutory provision at issue does not directly conflict with the provisions of the ADA. Although entitlement to Florida workers' compensation benefits is subject to the anti-discrimination provisions of the ADA, it does not follow that the ADA necessarily preempts Florida's workers' compensation laws. *Barry; Harding v. Winn Dixie Stores, Inc.*, 907 F.Supp. 386 (M.D. Fla. 1995).

Here, the ends served by the statutory provision challenged by Hensley on the one hand, and the ADA on the other hand, are strikingly different. The Florida Workers' Compensation Law is intended "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable

cost to the employer." § 440.015, Fla. Stat. (Supp. 1994). Thus, our workers' compensation act is designed in major part to assist the employee who, by reason of industrial injury, is unable to return to her customary work. The law seeks to provide medical payments and, in some cases, a disability stipend, while, at the same time, facilitating the injured worker's return to employment.

The ADA is intended first and foremost "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). The employment provisions of the ADA are "intended to prevent the prejudicial treatment of disabled persons and to allow such persons to compete in the workplace." *Barry*, 675 So. 2d at 589. Thus, as our Supreme Court noted, the ADA and the Florida Workers' Compensation Act "were designed to fulfill different goals." *Id.* Moreover, and as the *Barry* court further noted, "the ADA does not purport to guarantee equal rights to workers' compensation benefits for all handicapped persons regardless of their varying abilities to work." *Id.*

The general lack of conflict between state workers' compensation laws and the ADA has been highlighted by at least one commentator:

> Typically, a workers' compensation statute indemnifies an employee for medical expenses and loss of earning capacity associated with a work-related injury or condition. Conversely, the ADA, like many state statutes, insures that an employee realizes his or her earning potential. There is thus no conflict between the purposes of the two different kinds of statutes, nor

> would there ordinarily be any conflicting duties imposed on employers.

Perritt, *Americans With Disabilities Act Handbook*, § 5.12A (2d Ed.). The United States Equal Employment Opportunity Commission recognizes as much:

> In most cases, the definition of disability under state workers' compensation laws differs from that under the ADA, because the state laws serve a different purpose. Workers' compensation laws are designed to provide needed assistance to workers who suffer many kinds of injuries, whereas the ADA's purpose is to protect people from discrimination on the basis of disability.

U.S. Equal Employment Opportunity Comm'n, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, §9.2 (1992).

The statutory section under review today, section 440.02(1), Florida Statutes (Supp. 1994), excludes certain mental or nervous injuries from Florida's definition of "injury by accident arising out of the employment." Contrary to Hensley's argument, she has not suffered discrimination by virtue of having a psychiatric illness; rather, she is unable, under the terms of Florida's act, to prove that she suffered an injury by accident so as to be covered by workers' compensation. So long as this restriction bears a rational relationship to a legitimate state interest, the restriction is valid. *Winn-Dixie v. Resnikoff*, 659 So. 2d 1297, 1299 (Fla. 1st DCA 1995). In crafting an overall plan of workers' compensation, the Florida Legislature has apparently decided, in order to implement the stated intent of section 440.015, that some

exclusions from coverage are necessary. The stress, fright, or excitement exclusion now before us, is but one of several. *See, e.g.*, § 440.02(32), Fla. Stat. (Supp. 1994) (injury or death compensable only if "work performed in the course and scope of employment is the major contributing cause."); § 440.09(1)(a), Fla. Stat. (Supp. 1994) (no compensation required for any subsequent injury the employee suffers as a result of an original injury arising out of and in the course of employment unless the original injury is the major contributing cause of the subsequent injury); *Zundell v. Dade County School Bd.*, 636 So. 2d 8, 10 (Fla. 1994) (Under rule of *Victor Wine & Liquor, Inc. v. Beasley*, 141 So. 2d 581, 588 (Fla. 1961), claimant whose preexisting cardiovascular condition may have been exacerbated by work or conditions on the job may not recover "without first showing that the injury occurred during a job-related exertion over and above normal working conditions.").

We find no inconsistency between the goals of the ADA and Florida's decision to exclude from workers' compensation coverage mental or nervous injuries unrelated to compensable physical injury. We anticipate that instances of actual conflict between the ADA and our workers' compensation act will be rare. This is so because of the differing goals of the two laws, as discussed above. The Florida Workers' Compensation Law provides payments and medical coverage for injured workers who suffer, by reason of such injuries, changes in their employment status. The ADA provides no such protection, and rather, seeks to remove artificial and unnecessary barriers to employment, where such barriers are based upon unreasonable discrimination. *Barry*, 675 So.

2d at 589. By its own terms, nothing in the ADA "shall be construed to invalidate or limit the remedies, rights and procedures of any federal law or law of any state or political subdivision of any state or jurisdiction that provides greater or equal protection for the rights of individual with disabilities than are afforded by (the ADA)." 42 U.S.C. § 12201(b). Because no provision of Title I of the ADA purports to aid an injured worker such as Hensley in her desire to obtain benefits, we find no conflict between the ADA and section 440.02(1). Here, Hensley does not "contend that (s)he has been denied any benefits 'by reason of' any disability. Rather, (s)he asserts, fundamentally, that on account of (her) disability, (s)he is due benefits that have not been provided. Such a claim, quite simply, is not cognizable under the ADA." *McDonald v. Commonwealth of Massachusetts*, 901 F.Supp. 471, 479 (D. Mass. 1995).

AFFIRMED. (ERVIN and DAVIS, JJ., CONCUR.)

Supreme Court, U.S.
FILED
FEB 26 1997
CLERK

No. 96-1214

In The

Supreme Court of the United States

October Term, 1996

JEFFREY CRANE,

Petitioner,

v.

OLSTEN STAFFING SERVICES and LIBERTY MUTUAL,

Respondents.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents disagree with the argumentative manner in which the Petitioner phrases the questions presented for review. According to the main argument heading in his brief before the Florida First District Court of Appeal, the question presented was:

> Whether Sections 440.02(1) and 440.09, Florida Statutes (1993) is subject to and comports with the requirements of Title I of the Americans with Disabilities Act?

The fourth question listed in the Petition raises an issue regarding the Americans with Disabilities Act, Title II, 42 U.S.C. § 12132 et seq. As specified in his brief before the Florida First District Court of Appeal, the Petitioner's argument in the lower court was limited to Title I of the Americans with Disabilities Act.

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OPINION BELOW

The appendix to the Petition gives no indication of the issues which were presented to or considered by the Florida First District Court of Appeal in the proceeding below. Respondents will stipulate that the issue presented to the lower court was stated by the Petitioner in his initial brief in the following manner:

> Whether Sections 440.02(1) and 440.09, Florida Statutes (1993) is subject to and comports with the requirements of Title I of the Americans with Disabilities Act?

BASIS FOR JURISDICTION

Respondents disagree with the statement by Petitioner that the decision of the Florida Supreme Court in *Jenkins v. State,* 385 So. 2d 1356 (Fla. 1980), precludes review by the Florida Supreme Court. The decision in *Jenkins v. State* applies only to decisions which read in their entirety "per curiam affirmed." 358 So. 2d at 1359. The decision in the instant case stated:

> Per curiam.
>
> Affirmed. *See Hensley v. Punta Gorda, No. 96-358 (Fla. 1st DCA Jan. 6, 1997).*
>
> (Petitioner's App. at 11).

In *Jollie v. State,* 405 So. 2d 418 (Fla. 1981), the Florida Supreme Court held that this type of decision by a District Court of Appeal allows the Supreme Court to exercise its jurisdiction where the cited case is either pending review in or has been reversed by the Florida Supreme

Court. *Id.* at 420. The undersigned attorney acknowledges that the time for seeking review in the Florida Supreme Court in *Hensley* expired without the filing of a petition for discretionary review.

For the convenience of the Court, Respondents point out that counsel for the Petitioner filed an essentially identical petition in this Court in *Kienzle v. Englewood Disposal Co.*, ___ U.S. ___, 117 S.Ct. 766 (Case No. 96-720, 1997).

ADDITIONAL STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, Title I, 42 U.S.C. §12111(8), provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. §12111(8).

Florida Workers' Compensation Law defines "disability" in the following manner:

> "Disability" means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.
>
> Section 440.02(11), Florida Statutes (1995).

STATEMENT OF THE CASE

In the Petition, significant facts were omitted. Petitioner filed a claim for temporary total disability or temporary partial disability benefits under Florida's Workers' Compensation Law. (App. 2). There is no indication in the record that the Claimant made any attempt to establish that he could perform the essential functions of the employment position, as required to establish that he is a "qualified individual with a disability" under 42 U.S.C. §12111(8).

ARGUMENTS FOR DENYING THE PETITION

INAPPROPRIATE CHOICE OF FORUM.

Petitioner chose to bring his constitutional claim in an administrative setting. As the Judge of Compensation Claims stated in the compensation order, he had no power, authority or jurisdiction to determine whether the workers' compensation statute violates any state or federal statutes or constitutional rights or remedies. (App. 5). Nonetheless, the First District Court of Appeal has stated that it may be appropriate for an appellate court to allow this type of question to be raised for the first time on appeal from the final order of the administrative

judge. *Barry v. Burdines*, 667 So. 2d 241 (Fla. 1st DCA 1995), *approved on certified question*, 675 So. 2d 587 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 390 (1996). A review of the circumstances in this case indicates that these issues do not lend themselves to consideration for the first time on appeal to the District Court.

In *Ortega v. Owens-Corning Fiberglas Corp.*, 409 So. 2d 530 (Fla. 1st DCA 1982), an employee sued his employer in Circuit Court, the court of general jurisdiction, seeking a declaratory judgment that Florida's Workers' Compensation Law is unconstitutional on various grounds and demanding money damages for injuries alleged to have been caused by his employer's negligence. The Circuit Court dismissed the complaint based on the finding that the constitutional questions could be heard by the District Court of Appeal in the natural course of the administrative claim for workers' compensation benefits. 409 So. 2d at 531. The trial court concluded that it should abstain from considering the constitutional claims. *Id.*

On appeal, the appellate court held that the trial court had improperly dismissed the complaint for declaratory relief. *Id.* at 531-32. As one ground for the reversal, the Court stated:

> First, chapter 120 offers factfinding and other resources to a district court of appeal, for review of constitutional as well as non-constitutional issues in the interpretation of statutes, which simply are unavailable in chapter 440 appeals to this Court. Section 440.021, Florida Statutes (1981), exempts proceedings on workers' compensation claims from chapter 120. Therefore, while deputy commissioners function only as

> adjudicative officers in a traditional sense, a chapter 120 agency may be required to explore the factual assumptions on which its accustomed interpretation of a statute is predicated, if that may help the agency or court avoid a possibly unconstitutional interpretation. *Rice*, 386 So. 2d at 850. In respect to non-constitutional questions, too, such an agency may be required to adduce conventional proof in support of its preferred policy choice within the statutory bounds, preliminary to a district court deciding the issue as a matter of law or deferring to the agency in the formulation of policy. *E.g., Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013, 1018 (Fla. 1st DCA 1981); *School Board of Leon County v. Hargis*, 400 So. 2d 103 (Fla. 1st DCA 1981). No comparable resources are available to this Court in reviewing latent constitutional questions on workers' compensation appeals from orders of the deputy commissioners.
>
> 409 So. 2d at 532.

The second ground for reversing the dismissal was the fact that the Claimant was assailing Chapter 440 as a whole, and asked for nothing that a Deputy Commissioner was empowered to grant. 409 So. 2d at 532.

The instant case presented no issues which could be determined by the Judge of Compensation Claims. The parties presented a set of stipulated facts (App. 8-10), which established as a matter of law that the Petitioner's injury is excluded from coverage under the Florida Workers' Compensation Law. (App. 4). On appeal, the Claimant did not argue that the Judge of Compensation Claims committed any error. Instead, the sole issue raised

on appeal was an issue which was not presented to, litigated before or considered by the Judge of Compensation Claims in entering the compensation order. Any constitutional questions in this case, like the constitutional question in *Ortega,* are latent. These circumstances provided no basis for determining any constitutional questions because the nature of the forum precluded the parties from presenting a complete record for determination of those questions.

The proper forum for determining this type of constitutional question would have been a state circuit court or a federal district court. Those courts, unlike the District Court of Appeal, have the ability to establish a record in order to make an in-depth inquiry into constitutional challenges. If the Claimant in the instant case had brought an action for declaratory relief instead of seeking workers' compensation benefits which are clearly unavailable under the law, the trial court would have been able to consider any and all proofs which would be relevant to the issues which were raised in the instant case for the first time on appeal.

The reason the Petitioner chose the workers' compensation forum instead of filing an action for declaratory relief is obvious. The essence of the Petitioner's arguments is that there is no evidence that the statute is constitutional. Of course, there is no evidence that the statute is unconstitutional, since the Judge of Compensation Claims never considered any constitutional questions.

STANDING TO ASSERT ADA CLAIM.

A basic requirement for any claimant under the ADA is that he or she must be a "qualified individual with a disability." 42 U.S.C. §12112(a). The act defines this limitation in the following manner:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
>
> 42 U.S.C. §12111(8).

There is no indication in the record that the Petitioner made any effort to establish that he is a qualified individual with a disability. In fact, in the workers' compensation proceeding, the Claimant was seeking temporary partial or temporary total disability benefits. His condition was asserted to be both temporary and disabling as defined under the Workers' Compensation Law. In asserting that he is either totally or partially disabled in the workers' compensation proceeding, the Claimant essentially admits that he is not a qualified individual with a disability for the purposes of asserting a claim under the ADA.

The Third Circuit Court of Appeals considered a similar situation in *McNemar v. The Disney Store, Inc.*, 91

F.3d 610 (3d Cir. 1996), *petition for certiorari filed*, 65 USLW 3467 (No. 96-966, Dec. 16, 1996). In *McNemar*, the injured worker had attempted to state a claim of discrimination under Title I of the ADA. The Third Circuit Court agreed with the trial court's summary judgment, which had concluded that the claimant was judicially estopped from contending that he is a qualified person with a disability for the purposes of asserting an ADA claim. *Id.* at 619. Before the Social Security Administration, the claimant and his physicians had certified under penalty of perjury that he was totally and permanently disabled. *Id.* at 618. He made similar representations in applying for state disability benefits. *Id.* When he applied for an exemption from making payments on his student loans, he represented to the state that he was unable to work and earn money. *Id.* The Court stated:

> Thus, McNemar has represented to one federal agency and to the agencies of two different states that he was totally disabled and unable to work – while now, in claiming relief under the American Disabilities Act, he states that he is "a qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job" as contemplated by 42 U.S.C. §§12111(8), 12112(a).
>
> *Id.* at 618.

The Court pointed out that a person unable to work is not intended to be, and is not, governed by the ADA. The trial court had determined that the Claimant had failed to establish a prima facie case of discrimination under the statutory criteria because he admitted he was not qualified to perform his job as assistant manager at Disney,

and that he is thus judicially estopped from arguing that he is now "qualified" under the ADA. *Id.* at 619. Under the undisputed facts, the Third Circuit Court concluded that it would not disturb that determination. The Court recognized that a claimant may be forced to choose between seeking disability benefits and suing under the ADA. *Id.* at 620. Nevertheless, the Court concluded that nothing in the law permits one to undermine the integrity of the judicial system " . . . by playing fast and loose with the courts by asserting inconsistent positions." *Id.* (citation omitted).

The Petitioner in the instant case made no attempt to establish that he is a qualified individual with a disability. He did not attempt to show that he can perform the essential functions of the employment position which he holds or desires. A review of the petition reveals that the Petitioner never even represents to this Court that he is a qualified individual with a disability. He has not established standing to raise an ADA claim.

The Ninth Circuit Court of Appeals considered a similar standing problem in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). In *Kennedy*, the claimant was diagnosed with chronic fatigue syndrome, and was certified by her physician as disabled from work. *Id.* at 1479. On the same day her physician signed a disability note stating that she was disabled from work, the claimant signed an application for state disability benefits, and her supervisor called her at home and informed her that she was fired. *Id.* at 1480. The District Court determined that the claimant's deposition testimony that she was capable of working was belied by her detailed and definite sworn statement to the contrary on her disability benefit claim

forms. *Id.* The District Court also determined that the claim form statements and the physician's opinion established that the claimant was totally disabled, and thus there was no reasonable accommodation the employer could have made which would have enabled her to perform her job. The employer's motion for summary judgment on the ADA claim was granted. *Id.*

In reviewing the summary judgment, the Ninth Circuit Court first noted that an ADA claimant must establish that he or she is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position which the individual holds or desires. *Id.* at 1481. A plaintiff bears the burden of demonstrating that she can perform the essential functions of her job with or without reasonable accommodation. *Id.* Based upon the fact that there was no genuine dispute of the fact that she was totally disabled from performing her job, the Ninth Circuit affirmed the summary judgment on the ADA claim. The Petitioner in the instant case has made no effort to establish that he has standing to assert a claim under the ADA. As noted in *Kennedy v. Applause,* it was his burden to demonstrate that he could perform the essential functions of his job with or without reasonable accommodation. There is no indication in the record that he made even the slightest attempt to carry this burden. The Petitioner chose an inappropriate forum for establishing an ADA claim, and made no effort to establish the elements of an ADA claim in that forum. He presents no justiciable issues to this Court for review on certiorari.

PEACEFUL CO-EXISTENCE.

The relationship between the Florida Workers' Compensation Law and the ADA was considered by the Florida Supreme Court in *Barry v. Burdines*, 675 So. 2d 587 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 390 (1996). In *Barry*, the claimant was injured at work and received temporary total disability benefits for two and a half months, at which point he had reached "maximum medical improvement." *Id.* at 588. He returned to work at a limited capacity and began receiving wage loss benefits based on an impairment rating of nine percent. *Id.* at 588-89. He then filed a workers' compensation claim, asserting that Section 440.15(3)(b)4.D., Florida Statutes (1991), violates Title I of the ADA because it segregates disabled individuals arbitrarily and deprives them of an individualized assessment of their disabilities. *Id.* at 589.

The Florida Supreme Court disagreed with the argument. The Court noted that the ADA and the Workers' Compensation Law were designed to fulfill different goals. *Id.* The ADA was intended to prevent the prejudicial treatment of disabled persons and to allow them to compete in the workplace. *Id.* It does not guarantee equal rights to workers' compensation benefits for all handicapped persons regardless of their varying abilities to work. *Id.* It simply requires the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of impermissible classifications. *Id.* The Workers' Compensation Law, on the other hand, was created to provide an injured employee with an efficient delivery of disability and medical benefits at a reasonable cost to the employer. *Id.* It imposes no barriers which are prohibited

by the ADA, and the criteria employed by the Workers' Compensation Law are not inadequate, arbitrary or discriminatory. *Id*. The system set forth in the statute is a fair and efficient method for handling the large volume of workers' compensation claims, and the assessment procedure is sufficiently individualized to satisfy the ADA. *Id*. The Court concluded that the statute comports with ADA requirements. *Id*.

The ADA and the Florida Workers' Compensation Law exist in different spheres. The Workers' Compensation Law provides benefits to a person who can establish that he or she was injured on the job and that he or she cannot work. The ADA functions to prevent an employer from discriminating against a person with a disability when that person can establish that he or she can perform the essential functions of the job with or without reasonable accommodation. The Petitioner has no standing to present the argument he has presented, and the argument is without substance in any event.

CONCLUSION

Respondents, Olsten Staffing Services and Liberty Mutual Insurance Company, request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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